Hj Ahmad Kamal bin Zakaria & Ors v Perak Integrated Network Services Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-23NCVC-42–09 of 2019
JULIE LACK JC
9 MARCH 2022

Tort — Abuse of process — Want of reasonable and probable cause in filing court action — Suit 154 by defendant against plaintiffs was dismissed by High Court, inter alia, on ground it was an abuse of process — Whether Suit 154 was a revenge or retaliatory action against plaintiffs for obtaining judgment against defendant in an earlier suit and for filing a winding up petition against defendant's related company — Whether plaintiffs had proven tort of abuse of process against defendant on balance of probabilities — Whether defendant's submission of 'no case to answer' and failure to call rebuttal evidence strengthened plaintiffs' case which had to be presumed to be true — Whether adverse inference under s 114(g) Evidence Act 1950 had to be invoked against defendant for not calling rebuttal evidence — Whether plaintiffs were entitled to recover from defendant all legal fees and expenses they had incurred to defend themselves in Suit 154 and also general damages for the trouble, anxiety, harassment, injustice and time and effort wasted in defending themselves in Suit 154 and in the subsequent appeals

The fifth and sixth plaintiffs ('P5' and 'P6') and the defendant were parties to a joint venture agreement ('JVA') signed in 2006 to carry out certain telecommunication works. In 2012, P6 commenced a derivative action ('Suit 1041') against the defendant and three others for breach of contract and obtained judgment in its favour. Following upon that suit, the defendant sued the plaintiffs herein (in Suit 154) for breach of the JVA as well as for breach of fiduciary duties. The first plaintiff ('P1') was the chief executive officer of P5 and was also one of the two directors in P6, the third plaintiff ('P3') being the other director. The High Court dismissed Suit 154 on the ground, inter alia, that it was an abuse of process. The trial judge in that suit held that the defendant should have raised its claim in Suit 154 as a counterclaim in Suit 1041 and added the relevant parties against whom the counterclaim was raised so that all outstanding issues between the various parties could have been determined in a single action since the factual matrix and the documents concerning the issues were the same and involved more or less the same players. Since that was not done, the trial judge held that the defendant's claims in Suit 154 were barred by estoppel and res judicata. The defendant's appeal against the decision to the Court of Appeal was dismissed and it was denied leave to appeal further to the Federal Court. Based on the grounds of judgment of the trial judge in Suit 154 as well as the testimonies of two of the defendant's

main witnesses ('Iwan' and 'Zadey') in that suit — which the plaintiffs claimed revealed the frivolity of the defendant's claim — P1, P3, P5 and P6 (the second and fourth plaintiffs withdrew their claims) brought the instant action against the defendant for general and special damages for the tort of abuse of court process on the ground that Suit 154, and the appeals connected therewith, were instituted by the defendant maliciously and without reasonable and probable cause, thereby causing the plaintiffs to suffer loss and damage. P1 and P3, who were the only ones who testified at the trial of the instant suit, verily believed that Suit 154 was 'a lie from start to finish' and was nothing more than an act of revenge or retaliation by the defendant against the plaintiffs for filing Suit 1041 against the defendant and its three related parties. P1 and P3 testified that the defendant did not lead any credible evidence to substantiate its serious allegations against them in Suit 154 and caused them to suffer much anxiety, worry, inconvenience, injustice, harassment and wastage of time, effort and money in defending themselves in the suit and the related appeals over a period of five years. The plaintiffs suggested that P1, P5 and P6 be each awarded RM400,000 and P3 be awarded RM100,000 in general damages. The defendant did not call any witness to testify at the trial of the instant action and submitted that it had no case to answer. Among other things, the defendant argued that it was wrong of the plaintiffs to premise their instant action merely on certain remarks the trial judge had made in Suit 154 because the court there was not tasked to make a finding on whether or not the suit was filed for a collateral purpose. The defendant contended that in his grounds of judgment, the trial judge in Suit 154 was actually referring to the 'procedural abuse of process' under the Rules of Court 2012 in that the defendant had abused the process by not raising its claim in Suit 154 as a counterclaim in Suit 1041, thereby rendering its claim barred by res judicata and estoppel. The defendant argued that the trial judge did not mean that the defendant was guilty of the tort of abuse of process in filing Suit 154.

Held, awarding the plaintiffs special damages of RM1,295,056 for legal fees and expenses they had incurred in defending Suit 154 and general damages of RM100,000 to each of P1, P5 and P6 and RM60,000 to P3:

(1) Since the defendant elected to submit that it had no case to answer, its defence was rendered irrelevant, immaterial and not available for consideration and the evidence given by the plaintiffs had to be presumed to be true. The defendant's failure to testify not only strengthened the plaintiffs' case but warranted the invocation of adverse inference against the defendant under s 114(g) of the Evidence Act 1950. The court was of the view that the defendant's witnesses deliberately refrained from testifying for no other reason than their less than stellar evidence given in Suit 154. As against this, the court found both P1 and P3 to be reliable and credible witnesses and there was no reason to doubt their testimonies. The court accepted their evidence. They were convincing

and gave evidence forthrightly and were unshaken during cross-examination (see paras 39, 84 & 89–91). A

(2) The plaintiffs had proven their case against the defendant on balance of probabilities. They had proven that the defendant had an oblique motive or collateral purpose for filing Suit 154, namely, it was not to obtain a genuine legal redress as per its pleadings but to obtain a result not intended by the invocation of the process and which thereby caused the plaintiffs to suffer damage and injury (see paras 47, 50, 52, 87 & 114). B

(3) The existence of the collateral purpose behind the defendant's filing of Suit 154 was more than amply satisfied in the trial judge's grounds of judgment and in the testimonies of Zadey and Iwan at the trial. In particular, Iwan agreed during cross-examination that the only reason the allegations were levelled against the four individuals in Suit 154 was because of their relationship to D5. The trial judge, on the other hand, made comprehensive, coherent and concise findings in concluding that the filing of Suit 154 was plainly and patently an abuse of process as there was no basis and no evidence for the defendant's allegations against the plaintiffs. The question that was predominant in the trial judge's consideration was whether Suit 154 was an afterthought and a retaliation for the outcome against the defendant in Suit 1041 and/or the filing of the winding up petition by P6 against the defendant's related company, PINS OSC (see paras 44, 54, 56, 72, 77 & 85). C D E

(4) The trenchant findings of the trial judge in Suit 154 left no room for any lingering doubt that he was convinced that the suit was filed for a collateral purpose, an oblique motive. The judge had spent a good part of his judgment establishing that the defendant had committed the tort of abuse of process, especially after assessing the testimonies and credibility of the defendant's witnesses, Zadey and Iwan. The trial judge was not at all concerned with the procedural abuse of process under the Rules of Court 2012 ('the ROC'). Were it so, the judge would have plainly stated so and would have made clear references to O 18 r 19 of the ROC. Suit 154 was not concerned with an application under O 18 r 19 of the ROC. The trial judge made it clear in his grounds of judgment that from the narrative of events and conduct of the parties, the real or predominant purpose of filing Suit 154 was to neutralise the outcome reached in Suit 1041 which did not favour the defendant (see paras 59–61). F G H

(5) A party which had succeeded in proving that it was a victim of the tort of abuse of process was entitled to be awarded compensatory damages for the legal fees and expenses it had incurred to defend itself in the frivolous suit as well as for exemplary, punitive and aggravated damages upon proof of the same (see para 101). I

(6) The plaintiffs had successfully proven on balance of probabilities that they had suffered the whole gamut of emotional and pecuniary losses as a result of the defendant's filing of Suit 154; that the loss was caused by the defendant and that it was not too remote to recover that loss from the defendant. Based on the evidence adduced and the relevant case law, the plaintiffs were entitled to claim the RM1,295,056 they had expended as legal fees and expenses for defending themselves in Suit 154. In addition, the court opined that it was appropriate, fair and reasonable to award P1, P5 and P6 RM100,000 each, and P3 RM60,000, as general damages (see paras 106, 110 & 112–113).

[Bahasa Malaysia summary

Plaintif kelima dan keenam ('P5' dan 'P6') dan defendan adalah pihak dalam perjanjian usaha sama ('JVA') yang ditandatangani pada 2006 untuk menjalankan kerja-kerja telekomunikasi tertentu. Pada 2012, P6 memulakan tindakan terbitan ('Guaman 1041') terhadap defendan dan tiga yang lain kerana melanggar kontrak dan memperoleh penghakiman bagi pihak defendan. Berikutan guaman tersebut, defendan menyaman plaintif di sini (dalam Guaman 154) kerana melanggar JVA serta melanggar kewajipan fidusiari. Plaintif pertama ('P1') adalah ketua pegawai eksekutif P5 dan juga merupakan salah seorang daripada dua pengarah di P6, plaintif ketiga ('P3') merupakan pengarah lain. Mahkamah Tinggi menolak Guaman 154 atas alasan, antara lain, bahawa ia adalah penyalahgunaan proses. Hakim perbicaraan dalam guaman tersebut memutuskan bahawa defendan sepatutnya membangkitkan tuntutannya dalam Guaman 154 sebagai tuntutan balas dalam Guaman 1041 dan menambah pihak berkaitan terhadap tuntutan balas yang dibangkitkan tersebut supaya semua isu tertunggak antara pelbagai pihak dapat ditentukan dalam tindakan tunggal memandangkan matriks fakta dan dokumen berkaitan isu adalah sama dan melibatkan pihak yang lebih kurang sama. Oleh kerana ianya tidak dilakukan, hakim perbicaraan memutuskan bahawa tuntutan defendan dalam Guaman 154 telah dihalang oleh estoppel dan res judicata. Rayuan defendan terhadap keputusan Mahkamah Tinggi kepada Mahkamah Rayuan telah ditolak dan ia telah dinafikan kebenaran untuk merayu selanjutnya ke Mahkamah Persekutuan. Berdasarkan alasan penghakiman hakim perbicaraan dalam Guaman 154 serta keterangan dua saksi utama defendan ('Iwan' dan 'Zadey') dalam guaman tersebut — yang dituntut oleh plaintif mendedahkan tuntutan defendan yang remeh — P1, P3, P5 dan P6 (plaintif kedua dan keempat menarik balik tuntutan mereka) membawa tindakan semasa terhadap defendan untuk ganti rugi am dan khas untuk tort penyalahgunaan proses mahkamah atas alasan bahawa Guaman 154, dan rayuan yang berkaitan dengannya, telah dimulakan oleh defendan secara berniat jahat dan tanpa kausa yang munasabah, sehingga menyebabkan plaintif mengalami kerugian dan kerosakan. P1 dan P3, yang merupakan satu-satunya yang memberi keterangan pada perbicaraan guaman semasa tersebut, benar-benar percaya bahawa Guaman 154 adalah

'pembohongan dari awal hingga akhir' dan tidak lebih daripada tindakan membalas dendam atau tindakan balas oleh defendan terhadap plaintif kerana memfailkan Guaman 1041 terhadap defendan dan tiga pihak berkaitannya. P1 dan P3 memberi keterangan bahawa defendan tidak mengemukakan sebarang keterangan yang boleh dipercayai untuk mempertahankan dakwaan seriusnya terhadap mereka dalam Guaman 154 dan menyebabkan mereka mengalami kebimbangan, kegusaran, kesulitan, ketidakadilan, gangguan dan pembaziran masa, usaha dan wang dalam mempertahankan diri dalam guaman tersebut dan rayuan yang berkaitan dalam tempoh lima tahun. Plaintif mencadangkan supaya P1, P5 dan P6 masing-masing diberikan RM400,000 dan P3 diberikan RM100,000 sebagai ganti rugi am. Defendan tidak memanggil mana-mana saksi untuk memberi keterangan semasa perbicaraan tindakan semasa tersebut dan berhujah bahawa ia tidak mempunyai kes untuk dijawab. Antara lain, defendan berpendapat bahawa adalah salah bagi plaintif untuk mengandaikan tindakan segera mereka hanya atas kenyataan tertentu yang dibuat oleh hakim perbicaraan dalam Guaman 154 kerana mahkamah di sana tidak ditugaskan untuk membuat keputusan sama ada guaman tersebut difailkan atau tidak bagi tujuan cagaran. Defendan berhujah bahawa dalam alasan penghakimannya, hakim perbicaraan dalam Guaman 154 sebenarnya merujuk kepada 'penyalahgunaan proses prosedur' di bawah Kaedah-Kaedah Mahkamah 2012 di mana defendan telah menyalahgunakan proses tersebut dengan tidak membangkitkan tuntutannya dalam Guaman 154 sebagai tuntutan balas dalam Guaman 1041, dengan itu menyebabkan tuntutannya dihalang oleh res judicata dan estoppel. Defendan berhujah bahawa hakim perbicaraan tidak bermaksud defendan bersalah atas tort menyalahgunakan proses dalam memfailkan Guaman 154.

Diputuskan, membenarkan ganti rugi khas kepada plaintif sebanyak RM1,295,056 untuk yuran guaman dan perbelanjaan yang telah mereka tanggung dalam mempertahankan Guaman 154 dan ganti rugi am sebanyak RM100,000 kepada setiap P1, P5 dan P6 dan RM60,000 kepada P3:

(1) Memandangkan defendan memilih untuk mengemukakan bahawa ia tidak mempunyai kes untuk dijawab, pembelaannya telah menjadi tidak relevan, tidak material dan tidak tersedia untuk pertimbangan dan keterangan yang diberikan oleh plaintif perlu dianggap benar. Kegagalan defendan untuk memberi keterangan bukan sahaja mengukuhkan kes plaintif tetapi memerlukan penggunapakai anggapan teruk terhadap defendan di bawah s 114(g) Akta Keterangan 1950. Mahkamah berpendapat bahawa saksi defendan sengaja menahan diri daripada memberi keterangan tanpa sebab lain daripada keterangan mereka yang kurang jelas yang diberikan dalam Guaman 154. Sebagai perbandingan, mahkamah mendapati kedua-dua P1 dan P3 adalah saksi yang boleh dipercayai dan tidak ada sebab untuk meragui keterangan mereka. Mahkamah menerima keterangan mereka. Mereka meyakinkan dan

memberikan keterangan secara terus terang dan tidak goyah semasa pemeriksaan balas (lihat perenggan 39, 84 & 89–91).

(2) Plaintif telah membuktikan kes mereka terhadap defendan atas imbangan kebarangkalian. Mereka telah membuktikan bahawa defendan mempunyai motif jahat atau tujuan cagaran untuk memfailkan Guaman 154, iaitu, ia bukan untuk mendapatkan penebusan undang-undang yang tulen seperti dalam plidingnya tetapi untuk mendapatkan keputusan yang tidak dimaksudkan dengan permohonan proses dan yang menyebabkan plaintif mengalami kerosakan dan kecederaan (lihat perenggan 47, 50, 52, 87 & 114).

(3) Kewujudan tujuan cagaran di sebalik pemfailan Guaman 154 defendan adalah lebih daripada cukup memuaskan dalam alasan penghakiman hakim perbicaraan dan dalam keterangan Zadey dan Iwan pada perbicaraan. Khususnya, Iwan bersetuju semasa pemeriksaan balas bahawa satu-satunya sebab dakwaan dilemparkan terhadap empat individu dalam Guaman 154 adalah kerana hubungan mereka dengan D5. Hakim perbicaraan, sebaliknya, membuat dapatan yang komprehensif, koheren dan padat dengan membuat kesimpulan bahawa pemfailan Guaman 154 adalah secara jelas dan paten satu penyalahgunaan proses kerana tiada asas dan tiada bukti untuk dakwaan defendan terhadap plaintif. Persoalan yang utama dalam pertimbangan hakim perbicaraan adalah sama ada Guaman 154 adalah satu pemikiran semula dan tindakan balas terhadap keputusan terhadap defendan dalam Guaman 1041 dan/atau pemfailan petisyen penggulungan oleh P6 terhadap syarikat berkaitan defendan, PINS OSC (lihat perenggan 44, 54, 56, 72, 77 & 85).

(4) Dapatan tegas hakim perbicaraan dalam Guaman 154 tidak memberi ruang untuk sebarang keraguan yang berlarutan bahawa beliau yakin bahawa guaman tersebut difailkan untuk tujuan cagaran, motif jahat. Hakim telah menghabiskan sebahagian besar penghakimannya untuk membuktikan bahawa defendan telah melakukan tort penyalahgunaan proses, terutamanya selepas menilai keterangan dan kredibiliti saksi defendan, Zadey dan Iwan. Hakim perbicaraan sama sekali tidak bimbang dengan penyalahgunaan prosedur proses di bawah Kaedah-Kaedah Mahkamah 2012 ('KKM'). Sekiranya demikian, hakim akan menyatakan dengan jelas dan akan membuat rujukan yang jelas kepada A 18 k 19 KKM. Guaman 154 tidak berkaitan dengan permohonan di bawah A 18 k 19 KKM. Hakim perbicaraan menjelaskan dalam alasan penghakimannya bahawa daripada naratif peristiwa dan kelakuan pihak-pihak, tujuan sebenar atau utama memfailkan Guaman 154 adalah untuk meneutralkan keputusan yang dicapai dalam Guaman 1041 yang tidak memihak kepada defendan (lihat perenggan 59–61).

(5) Pihak yang telah berjaya membuktikan bahawa ia adalah mangsa tort penyalahgunaan proses berhak untuk diberikan ganti rugi pampasan bagi fi guaman dan perbelanjaan yang telah ditanggungnya untuk membela diri dalam guaman remeh tersebut serta sebagai teladan, ganti rugi punitif dan teruk atas pembuktiannya (lihat perenggan 101).

(6) Plaintif-plaintif telah berjaya membuktikan berdasarkan imbangan kebarangkalian bahawa mereka telah mengalami keseluruhan kerugian emosi dan kewangan akibat pemfailan Guaman 154 oleh defendan; bahawa kerugian tersebut disebabkan oleh defendan dan bahawa ia tidak terlalu sedikit untuk mendapatkan semula kerugian tersebut daripada defendan. Berdasarkan keterangan yang dikemukakan dan undang-undang kes yang berkaitan, plaintif-plaintif berhak menuntut RM1,295,056 yang telah mereka belanjakan sebagai fi guaman dan perbelanjaan untuk membela diri dalam Guaman 154. Di samping itu, mahkamah berpendapat bahawa ia adalah wajar, adil dan munasabah untuk membenarkan P1, P5 dan P6 RM100,000 setiap seorang, dan P3 RM60,000, sebagai ganti rugi am (lihat perenggan 106, 110 & 112–113).]

Cases referred to

Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another [2013] 4 All ER 8, PC (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, CA (refd)

Sinarlim Sdn Bhd v Medallion Builders Sdn Bhd (dahulunya dikenali sebagai RC-Soils (M) Sdn Bhd) and others application [2012] MLJU 847, HC (refd)

Solsis (M) Sdn Bhd v Kenny Woo B'ng Tat & Anor [2020] 8 MLJ 695, HC (refd)

Sonic Finance Inc & Anor v Halim bin Mohammad & Ors [2019] MLJU 1887; [2019] 1 LNS 651, HC (folld)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (folld)

Visage Engineering Sdn Bhd v Geopancar Sdn Bhd [2012] MLJU 377; [2012] 1 LNS 286, HC (refd)

Yong Toi Mee & Anor v Malpac Holdings Bhd & Ors [2017] MLJU 1674, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Rules of Court 2012 O 18 r 19

Leong Kwong Wah (with Vincent Lim Seng and Steven Tan Chee Qian) (Dennis Nik & Wong) for the plaintiff.

Razlan Hadri Zulkifli (with Chai Tze Jing) (Gan, Ho & Razlan Hadri) for the defendant.

Julie Lack JC:

[1] This is the judgment of the court after a full trial.

[2] The plaintiff's claim for general and special damages arising from the tort of abuse of process was allowed by this court on 19 November 2021.

[3] Dissatisfied with the said decision, the defendant has appealed against the entirety of that decision.

PARTIES

[4] The plaintiffs in this case are:

(a) Hj Ahmad Kamal bin Zakaria (first plaintiff);

(b) Azrina Mohamad Aziz (third plaintiff);

(c) Bunga Raya ICT Sdn Bhd (fifth plaintiff); and

(d) Urban Domain Sdn Bhd (sixth plaintiff).

[5] The second and fourth plaintiffs have withdrawn their claims against the defendant leaving the above said plaintiffs to continue on to pursue their claim.

[6] The first plaintiff is the chief executive officer of Bunga Raya ICT Sdn Bhd ('Bunga Raya'), the fifth plaintiff.

[7] The first plaintiff is at the same time the director of Urban Domain Sdn Bhd ('Urban Domain'), the sixth plaintiff.

[8] The third plaintiff is the other director of Urban Domain. She is also the financial manager of the defendant and is in charge of its bookkeeping and accounting functions.

[9] The defendant (interchangeably referred to as 'PINS') is a private limited company incorporated in Malaysia and has its registered office in Sungai Buloh, Selangor.

[10] Bunga Raya, Urban Domain and PINS were previously parties to a joint venture agreement dated 22 February 2006 signed between Bunga Raya and PINS to carry out concession works and license works in the state of Perak.

[11] At the commencement of the trial, counsel for the plaintiffs informed the court they were withdrawing the claim for malicious prosecution and wished to proceed only with the tort of abuse of court process against PINS.

BACKGROUND/PLAINTIFFS' PLEADED CASE

[12] The plaintiffs' pleaded case is expounded in the statement of claim filed on 12 September 2019.

[13] It can safely be said that the plaintiff's claim emanated from an earlier High Court Civil Suit No 22NCVC-154–04 of 2014 ('Suit No 154') tried in the Kuala Lumpur High Court. The plaintiffs have referred to and relied on the High Court order dated 14 July 2017 and the grounds of judgment ('GOJ') dated 14 July 2017 in Suit No 154 for its full terms and effect to found the instant civil suit against PINS.

[14] Suit No 154 was initiated by PINS against the plaintiffs for breach of the above mentioned joint venture agreement dated 22 February 2006 as well as for breach of fiduciary duties.

[15] Reference must also be made to another Kuala Lumpur High Court case ie Civil Suit No 22NCC-1041–07 of 2012 ('Suit No 1041') which was a derivative action initiated by Urban Domain alleging breaches of contract on the part of PINS and one Dato' Seri Dr Abdullah Fadzil Che Wan. The claim was allowed in favour of Urban Domain on 26 September 2013.

[16] It is the plaintiffs case that on 2 April 2014 PINS had maliciously and without reasonable and probable cause instituted Suit No 154 against the plaintiffs based on breach of fiduciary duties.

[17] Suit No 154 was set down for trial over 11 days before the High Court judge S Nantha Balan J (as he then was) and upon hearing oral evidence from all the seven witnesses called and having had sight of all the documentary evidence made available during the duration of the trial the learned judge dismissed PINS' claim in Suit No 154 on the ground, inter alia, that it constituted an abuse of process.

[18] In particular the plaintiffs rely on paras 52.3 and 79 of the GOJ in Suit No 154 which reads as follows:

(a) para 52.3:

> On that analysis, and based on the narrative of facts alluded to earlier, I am convinced that this suit is plainly and patently an abuse of process.

(b) para 79:

> As I stated earlier, the filing of this suit in light of all of the events had taken place earlier, is an abuse of process. This suit clearly have been brought as part of the PINS counterclaim in Suit No 1041 and D1 to D5 could have been brought in as additional parties to the counterclaim. In that way, all necessary and relevant parties would have been present and everything could have been dealt with by the learned judge in that case. Of course, Suit No 1041 would have become more complex but that is far better than to have two courts to hear suits which arose out of the same factual matrix involving more or less the same players and the same documents. Clearly, this is a classic case where estoppel and res judicata should apply.

[19] The plaintiffs also relied on the supplementary witness statement of Zadey Che Wan bin Abdullah Fadzil ('Encik Zadey') of the defendant, wherein his evidence in answer to question one was as follows:

> ... Hence, we made the decision to allow Ahmad Kamal to build for others but not to own any infrastructures.

[20] The plaintiffs averred that the stand taken by Encik Zadey above constituted an abandonment of the pleaded claim in Suit No 154.

[21] PINS was dissatisfied with the outcome of the decision in Suit No 154 and appealed to the Court of Appeal. On 4 July 2018 the Court of Appeal dismissed the appeal with costs.

[22] On 3 August 2018, PINS applied for leave to appeal to the Federal Court. The said application for leave was dismissed with costs.

[23] The plaintiffs aver that PINS in pursuing the appeal and the leave application had acted in continuation and expansion and/or aggravated the abuse of process and by reason of those acts had caused the plaintiffs to suffer loss and damage.

WITNESSES CALLED AT THE TRIAL

[24] Only two witnesses were called at the trial. These were the plaintiffs' witnesses. They were:

(a) PW1: Hj Ahmad Kamal bin Zakaria (first plaintiff); and

(b) PW2: Azrina Mohamad Aziz (third plaintiff).

THE DEFENDANT'S CASE

[25] At the close of the plaintiffs' case PINS submitted no case to answer. Consequently, PINS did not testify at the trial.

SUMMARY OF THE EVIDENCE OF PW1

[26] In his testimony, PW1 related to the court the basis of the plaintiffs' legal action for abuse of process which he said was based on the GOJ dated 14 July 2019 in Suit No 154 and also from his own personal knowledge of revenge and understanding of injustice.

[27] PW1 claimed that Suit No 154 was nothing more than an act of revenge perpetrated by PINS upon the plaintiffs in retaliation for the filing of Suit No 1041 by Urban Domain against the defendant, PINS, OSC and Maintenance Services Sdn Bhd and Dato Fadzil Che Wan. After Urban Domain obtained judgment against PINS, they took revenge against Urban Domain by filing Suit No 154 against him. PW1 said that PINS believed he was the alter ego of Urban Domain and Bunga Raya and thus wanted to punish all the plaintiffs as they were also defendants in Suit No 154.

[28] When asked to elaborate on what he meant by 'revenge' PW1 described Suit No 154 as being a lie from start to finish, that PINS did not have any evidence to support their claim but yet went ahead anyway with litigating their claim. To him it amounted to nothing more than a means of retaliation against him.

[29] PW1 attested to the fact that Iwan who is one of PINS' main witness at the trial abandoned their pleaded case and alleged that PINS had exclusivity to build telecommunication towers and broadband structures in Perak. PINS' other witness Encik Zadey, however in his supplemental witness statement made it clear that it was never an issue of exclusivity to build but rather it was an issue of waiver to build but not to own small or mini structures.

[30] PW1 explained that Suit No 154 was also used to punish the second, third and fourth plaintiffs as they were deemed to be associated with him via their involvement in the telecommunication industry.

[31] PW1 said all the plaintiffs suffered injustice in having to defend Suit No 154 which should not have been brought against them in the first place. They should not have been forced to defend themselves in Suit No 154. They should not also have been forced to defend themselves again at the Court of Appeal and the Federal Court.

[32] PW1 relied on para 49 of the GOJ where the learned judge stated 'the instant suit was an obvious manifestation of an abuse of process' to support his stand that the learned judge was aware PINS was unhappy with the judgment in favour of Urban Domain in Suit No 1041 and hence that unhappiness germinated itself for all to see in Suit No 154.

[33] PW1 referred to several more paragraphs from the GOJ in Suit No 154 which showed that PINS did not lead any credible evidence to substantiate all their serious allegations against the plaintiffs, that they did not challenge him during cross-examination and had failed to prove all their allegations on a balance of probabilities. PW1 stated that PINS in effect did not have any evidence against him and he felt that it was wrong of them to proceed with the trial and then 'back off' when challenged under cross-examination. PW1 said PINS knew from the onset of the case that it had no evidence to support its claim.

[34] Under cross-examination PW1 explained why he thought the defendant's actions were unjust and an abuse of process. Having to defend Suit No 154 was a harassment to him, was troublesome and had caused him inconvenience. He was forced to attend meetings, read documents, attend to his lawyers' queries and spent time preparing his witness statements. This was on top of him having to attend court proceedings for 11 days and worse of all to endure intrusive cross-examination even after PINS had effectively abandoned its pleaded case. PW1 felt that they should have withdrawn their case instead of turning the whole action into a personal attack against him. PW1 said he had to endure five years of worry and anxiety with the case hanging over his head.

[35] When asked to explain why he thought Suit No 154 was an afterthought and retaliation for Suit No 1041, PW1 said it was obvious that Suit No 154 was filed as a tool to exert pressure on Urban Domain. PW1 alleged that PINS was hoping Suit No 154 could be used as a bargaining chip for Suit No 1041. This was borne out by the fact that he and Iwan had a few discussions to settle both suits but PW1 stayed resolute in refusing to entertain any overtures of settlement.

[36] PW1 said he was justified and vindicated when the learned judge gave a thorough and systematic analysis of the facts and evidence in his GOJ and found in favour of all the plaintiffs. In his testimony PW1 attested to the following:

Q19: What do you mean by abuse of process?

A19: I understand it in the way it was explained in the grounds.

Q20: Can you explain further?

A20: Yes, I can. I refer to the finding of abuse of process in three paragraphs of the grounds, being paras 49, 52.3 and 79.

Q21: What about para 49?

A21: Paragraph 49 reads, inter alia, 'And so, it is relevant to ask why PINS did not make the present claim as part of its counterclaim in Suit No 1041? It was therefore strongly argued for the defendants that based on the facts and circumstances alluded to above, res judicata in the 'wider sense' applied and that the instant suit was an obvious manifestation of an abuse of process. It is of course trite that whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies. I will return to this topic in due course. I now move on to the topic of the plaintiffs' pleaded case'. I want to draw attention to the words, 'the instant suit was an obvious manifestation of an abuse of process'. I also want to draw attention to the words, 'where the justice of the individual and particular case lies' [see Common Bundle of Documents at Vol 1, p 33].

Q50: What do you mean abuse of process in the legal sense?

A50: I mean the judge said 'abuse of process'. My own words are 'injustice', 'harassment', 'worry', 'anxiety', 'trouble', 'inconvenience', 'time consumed', 'effort consumed', 'punishment', 'revenge' and 'dark cloud over my head'.

EVIDENCE OF PW2

[37] PW2 accepted and adopted the evidence given by PW1 as it mirrored the basis of her claim which is premised on the GOJ in Suit No 154.

[38] Nonetheless she personally felt she was a victim of the abuse of process perpetrated by PINS. She felt it was 'too much' to be unjustly accused of stealing confidential information belonging to PINS to benefit the first and fifth plaintiff when she was not even involved in the ground operation involving coordinates. She felt that she was dragged in and sued just because of her association with the first plaintiff in the telecommunication industry.

DEFENDANT'S CASE

[39] Since the defendant elected to submit on no case to answer, its defence is rendered irrelevant, immaterial and not available for consideration (see *Sinarlim Sdn Bhd v Medallion Builders Sdn Bhd (dahulunya dikenali sebagai RC-Soils (M) Sdn Bhd) and others application* [2012] MLJU 847).

SUBMISSION OF NO CASE TO ANSWER AND THE LAW

[40] At the close of the plaintiffs' case the defendant elected not to call any witnesses and submitted there was no case to answer.

[41] The legal position which stands when a party chooses to submit on no case to answer has been well set out by the Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 where it was held:

> [56] Learned counsel for the plaintiff argued that the Court of Appeal ought not to disturb findings of fact by the High Court. He added that the Court of Appeal had gone beyond its appellate powers in this case as the reversal and substitutions of the findings of facts was wholly unjustified and therefore the judgment of the Court of Appeal should therefore be set aside. It was further submitted that the evidence led by the plaintiff must be assumed to be true when the defendant elected not to call any witnesses. On these submissions we have two observations to make. The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 and *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785). *And the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement* (see *Ranbaxy (M) Sdn Bhd v E I Du Pont De Nemours & Co* [2011] MLJU 1135; [2011] 1 LNS 16; [2011] 1 AMCR 857). *In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim* (see *The Fordeco Nos 12 And 17; The Owners of and all other persons interested in the ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners of the ship Mv Xin Hua 10* [2000] 1 MLJ 449; [2000] 1 CLJ 605; *Maju Holdings Sdn Bhd V Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282 and *Teh Swee Lip v Jademall Holdings Sdn Bhd* [2013] 6 MLJ 32; [2014] 8 CLJ 451). It is true that in the present case the defendant elected not to call any witnesses. *However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law*. In this regard, in adopting the approach of the case of *Storey v Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah bin Alang Ibrahim and Anor* [2007] MLJU 563; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:
>
> > There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. *In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged*. (Emphasis added.)

[42] In short, the court can only determine whether upon the evidence adduced by the plaintiff, documents admitted into evidence and the

cross-examination of the plaintiffs' witnesses whether a prima facie case against the defendant has been established or put in other words whether the claim has a reasonable prospect of success (see judgment of Darryl Goon J (as he then was) in *Solsis (M) Sdn Bhd v Kenny Woo B'ng Tat & Anor* [2020] 8 MLJ 695).

FINDINGS OF THE COURT

[43] Central to the issues for determination in this case are the reasons of the learned judge in coming to his decision in Suit No 154. It would be inconvenient to incorporate the whole of the GOJ into mine but suffice if I select a number of paragraphs to highlight and support the reasons why I came to my decision.

[44] It is my considered view the learned judge in Suit No 154 made comprehensive, coherent and concise findings in coming to his conclusion that the filing of the said suit was plainly and patently an abuse of process.

Applicable law on tort of abuse of process

[45] In 2013 the Privy Council explained the nature of this tort via the case of *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another* [2013] 4 All ER 8 as follows:

> The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought. The paradigm case is the use of the processes of the court as a tool of extortion, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do.

[46] The Malaysian courts recognize the tort of abuse of process via the Court of Appeal case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425. Here the court outlined the elements to be proven in a claim based on the tort of abuse of process as follows:

> In my judgment, the essential elements of the tort of abuse of process are these:
>
> (a) The process complained of must have been initiated;
>
> (b) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and
>
> (c) The plaintiff must have suffered some damage or injury in consequence.

> It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort ...

[47] Thus, in order to succeed in this suit, it is incumbent upon the plaintiffs to show all the requisite elements of the tort of abuse of process have been proved. The elements I refer to is as follows:

(a) the process complained of has been initiated;

(b) there was a collateral purpose proven; and

(c) damage or injury was suffered by the plaintiffs as a consequence.

Has the process complained of been initiated?

[48] The first hurdle for the plaintiffs is to satisfy this court whether the process complained of has been initiated or not. In this regard I am in no doubt this element has been satisfied. It is not disputed that Suit No 154 was completed and decided in favour of all the plaintiffs.

Oblique motive/collateral purpose?

[49] In so far as the second element of the tort of abuse of process is concerned, learned counsel for the defendant in his submissions was at pains to impress upon the court that the tort of abuse of court process is a cause of action separate and distinct from an abuse of process in the context of a striking out application pursuant to the Rules of Court 2012 ('the ROC 2012').

[50] Certainly it would be tempting to equate both in one and the same category. However, what distinguishes one from the other is the presence and the requirement of a collateral purpose in the tort. As was explained by His Lordship Gopal Sri Ram CJA (as he then was) in *Ungku Nazaruddin's* case the purpose of initiating the litigation process has to be a purpose other than to obtain a genuine legal redress, a collateral purpose, a purpose aimed at producing a result not intended by the invocation of the process.

[51] It cannot and should not be equated with the reason simpliciter that a suit was dismissed for it to amount to an abuse of process of the court. This was explained by the High Court in the case of *Visage Engineering Sdn Bhd v Geopancar Sdn Bhd* [2012] MLJU 377; [2012] 1 LNS 286 as follows:

> It must be noted that the tort of abuse of process is not to be equated with the simple dismissal of a suit on the basis that it amounts to an abuse of process of the court. In essence, the threshold requirement to make out a case of tort of abuse of process of court is high and it is not sufficient to show the petition itself was dismissed ... those who pursue an action under this head of tort must still prove the requisite elements as set out in well-established cases and also ought to be pleaded in the right

perspective. Mere dismissal of a winding up petition or suit on the ground of abuse of process etc per se will not attract the said tort. A

[52] It is the plaintiffs' obligation to prove there was an oblique motive or in other words a collateral purpose on the part of PINS in filing the Suit No 154 in order to succeed in this present suit. B

[53] The meaning of collateral purpose was well explained in *Crawford Adjusters* and I do not propose to repeat it here.

C

[54] In my considered view the existence of the collateral purpose behind PINS filing of Suit No 154 has been more than amply satisfied with the pronouncement by the learned judge in the GOJ. In his usual objective and analytical scrutiny of the evidence and the issues the learned judge had concluded and made findings in regard to the collateral purpose behind PINS' initiation of Suit No 154. D

[55] The learned judge had pondered the question as to why the claim and the multitude of allegations against all the plaintiffs was not raised in the earlier suit. In para 49 of the GOJ the learned judge raised this question: E

> ... why PINS did not make the present claim as part of its counterclaim in Suit No 1041?

[56] The question predominant in His Lordship's consideration was 'whether the present suit was an afterthought and a retaliation for the outcome in Suit No 1041 and/or filing of the winding up petition by Urban Domain against PINS and OSC?' (see para 52 GOJ). F

[57] His Lordship's decision was affirmatively as follows: G

> [52.1] In this regard, based at the chronology of events and the manner in which the case has been pleaded and the evidence of PW1 and PW2, *it is quite clear from the narrative of events and conduct of the parties, that the present suit is an afterthought and quite possibly filed in order to neutralize, so far as possible the outcome that was reached in the earlier proceedings which did not favour the plaintiff*. H
>
> [52.2] In this regard *I cannot ignore the possibility that the present suit was filed with an oblique motive or a collateral purpose*.
>
> [52.3] On that analysis, and based on the narrative of facts alluded to earlier, *I am convinced that this suit is plainly and patently an abuse of process*. (Emphasis added.) I

[58] Counsel for the defendant had with his usual eloquence contended that the abovesaid findings made by the learned judge in Suit No 154 could not in itself prove the elements of the tort of abuse of process to the instant suit. On

A that basis, counsel concluded that the learned judge was addressing his mind pertaining only to the issues of estoppel and res judicata in the case. Counsel argued that the High Court in Suit No 154 was not tasked to make any finding of fact on the purpose of filing the civil claim or that it was filed for a collateral purpose. Premised on that, counsel was therefore of the opinion that the only B basis for the learned judge to arrive at his finding on abuse of process was estoppel and res judicata. Thus, it was contended that the learned judge was only making a finding of fact that the filing of Suit No 154 was a procedural abuse of process under the ROC 2012. I was not convinced.

C

[59] In my considered view the trenchant findings of the learned judge in Suit No 154 left no room for any lingering doubt that His Lordship was convinced that Suit No 154 was filed for a collateral purpose, an oblique motive and not merely on the issues of estoppel and res judicata. The court can only make findings from the records, the evidence before it and from the GOJ D of the learned judge. I have scrutinized and considered the GOJ carefully and it is my conclusion that the learned judge had spent a good part of his judgment on establishing that PINS had committed the tort of abuse of process. His Lordship was constantly mindful of the oblique motives and collateral purpose of PINS especially after assessing the testimonies and credibility of the E witnesses Encik Zadey and Iwan.

[60] To my mind the learned judge was not at all concerned with the procedural abuse of process pursuant to the ROC 2012. Were it so His F Lordship would have plainly stated so and would have made clear references to O 18 r 19 of the ROC 2012. It would be pertinent too to add that Suit No 154 was never an application under O 18 r 19 of the ROC 2012.

[61] I find that it was plain to see that the real or predominant purpose of G PINS in bringing the action was not to obtain genuine redress for its grievances. The learned judge made that clear in his GOJ. In paras 52.1 and 52.2 of the GOJ the learned judge recognized the defendant's real or predominant purpose of filing the suit when he held that from the narrative of events and conduct of parties, Suit No 154 was filed in order to neutralize the H outcome reached in Suit No 1041 which did not favour them.

[62] The gist of PIN's complain in the pleadings was that there was a breach of fiduciary duties or obligations by parties to the joint venture agreement, whereby projects that should have been undertaken by the plaintiffs were I diverted to Bunga Raya (see para 11 of the GOJ).

[63] During the trial, PINS' complaints were in regard to, inter alia, the construction and alleged ownership by Bunga Raya of 18 small and mini structures, which was constructed for Celcom and which according to Bunga

Raya, was done based on co-ordinates given to them by Celcom (see para 16.3 of the GOJ).

[64] That changed midway through examination of PINS witnesses. Paragraph 51.1 of the GOJ records this observation:

> First, is the content of the plaintiff's pleaded case (per the amended statement of claim) and the attempt at departing from it in material aspects during the trial.

[65] However the issue of 'ownership' of small and mini structures was not specifically raised in the amended statement of claim ('ASOC') and therefore the learned judge decided to disregard that allegation (see para 65 GOJ).

[66] It is evident from the testimonies of Encik Zadey and Iwan that PINS was never truly interested to obtain the reliefs prayed for in the ASOC. PINS showed their hand when Encik Zadey in his witness statement alleged there was an agreement that the fifth plaintiff could build but not own small and mini structures. Certainly without a doubt this evidence constituted an abandonment of PINS' original pleaded claim. To make matters worse under rigorous cross-examination the witness caved in and admitted that even this reason was not true. This confirmed the plaintiffs' claim that for all intents and purpose PINS did not have a true grievance for Suit No 154. The learned judge was conscious of that and pinned this as the collateral purpose which was the predominant underlying reason for the suit.

[67] Both PW1 and PW2 testified to this fact and this can be seen from their own words what they thought of the suit against them. Both saw the allegations as spurious lies and an act of revenge personally against them. In his evidence PW1 was asked to explain why he claimed that it was a means of 'revenge' and he replied that Suit No 154 was built on a lie from start to finish and that Encik Zadey and Iwan on behalf of PINS did not have any evidence to support their claim but still they went ahead purely as a retaliation against PW1. PW1 pointed out that Suit No 154 was filed while in the process of exhausting the appeal process in Suit No 1041 and it was filed for no other reason than as a tool to exert pressure on Urban Domain. PW1 further recounted that he and Iwan held discussions to settle Suit No 154 and Suit No 1041 amicably but he said he would not agree to accept Suit No 154 as a bargaining chip. Under cross-examination, it was put to PW1 that the discussion took place only during formal mediation. PW1 disagreed and asserted that there were discussions with Iwan at other times and not only during the mediation.

[68] Azrina, PW2 too in her testimony alleged that she was dragged in and sued as a retaliation simply because of her association with PW1 in the telecommunication industry.

[69] The defence argued that the plaintiffs' claim should fail as the allegation of collateral purpose was not pleaded specifically in the statement of claim ('SOC'). It was contended that merely relying on the cause papers and GOJ of the High Court in Suit No 154 is insufficient as no further particulars were pleaded of the tort alleged. Counsel for the defendant advanced the submission that issues such as 'revenge', 'punishment', 'personal attack' and 'bargaining chip' were never pleaded. Counsel contended that since parties are bound by their pleadings, they cannot be allowed to improve their pleadings through their respective testimonies. It was further contended that merely relying on the observations of the High Court judge in Suit No 154 alone would be inadequate to prove the plaintiffs' claim that the defendant is liable for the tort of abuse of court process.

[70] Having considered the pleadings as a whole and in particular to paras 10 to 18 of the SOC, I am of the considered view that it is not necessary to use those actual phrases in the pleadings. The collateral purpose can be gleaned from a number of ways among them would be from the facts and circumstances of the particular case. The collateral purpose can also be obtained and discerned from the testimonies of the witnesses and the documentary evidence used to support the claim.

[71] I noted that those were the words used by both witnesses to describe and express their thoughts and their feelings from a personal point of view after judgment was pronounced in their favour. In particular I refer to the answers given by PW2 in cross-examination:

> CTJ: Now, questions 14 and 15. You used phrases and words such as 'to retaliate against me', 'association with Haji Kamal' and 'Suit No 154 is an obvious lie'. Again, would you agree with me that these words are not pleaded and no particulars of these words are pleaded in the statement of claim?
>
> PW2: In our statement of claim, the whole judgment is pleaded and these words are coming from the judgment itself. The word retaliation is from the judge himself. So, its all actually pleaded.
>
> DC: So, only the word retaliation is from the judgment. Correct?
>
> PW2: Yeah. Revenge is another word for the retaliation, which is covered under the judgment, which is covered under the associates.
>
> CTJ: Okay. So, you are saying, because you have pleaded the grounds of judgment in your statement of claim, hence everything else that comes from that is taken as pleaded. Is that what you're saying?
>
> PW2: Yes.

[72] It is pertinent to point to the evidence of Iwan in Suit No 154 at the particular moment where he capitulated and agreed that the only reason the

allegations were levelled against the four individuals is because of their relationship with Bunga Raya. This admission is significant and that in itself shuts the door to any doubt whatsoever in regard to the defence contention that the plaintiff had failed to prove the collateral purpose behind the filing of Suit No 154.

[73] I now refer to para 12 of the SOC which reads as follows:

> In particular, the plaintiffs will rely on the supplementary witness statement of Encik Zadey Che Wan bin Abdullah Fadzil of the defendant, wherein his evidence at A1 reads 'Hence, we made the decision to allow Ahmad Kamal to build for others but not to own any infrastructures'.

[74] I also refer to para 13 of the SOC whereby it was pleaded as follows:

> The plaintiffs aver that the aforesaid evidence constituted an abandonment of the pleaded claim in the suit.

[75] In paras 15 and 18 of the SOC, it was specifically pleaded that the defendant continued and/or expanded and/or aggravated the abuse of process by the appeal to the Court of Appeal and thereafter by the application for leave to appeal to the Federal Court.

[76] I would respectfully agree with the submissions of counsel for the plaintiffs' that after abandoning its pleaded case, after PINS' witnesses caved in and capitulated in no uncertain terms, why then did they continue to pursue the appeal process. By filing the appeals, PINS had continued and further aggravated the abuse of court process.

[77] More importantly I take note that the learned judge made findings that PINS failed to lead evidence to support its pleaded and unpleaded case. In paras 69, 70, 71, 76, 80, 85 and 89 of the GOJ the learned judge made it plainly clear there was no basis and no evidence for PINS' allegations against the plaintiffs. The learned judge found gaps in PINS' claim. This is seen in para 72 of the GOJ where it was held 'the failure to call someone from the Telco created a gap in the plaintiff's case theory'.

[78] I also refer to para 84 of the GOJ where the learned judge held:

> ... thus, PW1's own evidence has largely demolished the plaintiff's basic structure of the case.

[79] What I consider quite damaging is the finding in para 85 in the GOJ where it was held:

> ... the plaintiff did not lead any or any credible evidence.

To make matters worse the learned judge observed that:

> PW1 and PW2 made strong allegations in their witness statements but when confronted during cross-examination they 'backed off'.

[80] In addition to the above, I would agree with the plaintiffs' graphic but rather appropriate description that they were 'mucked around' from start to finish by PINS. Support for this view can be found in these following instances:

(a) the crafting of the ASOC without supporting evidence and/or with documents that proved otherwise;

(b) in mid-trial, by Encik Zadey's supplemental witness statement which is a clear abandonment of its pleaded case;

(c) the timing of Encik Zadey's supplemental witness statement which sought to introduce a new case in the middle of the trial and in the middle of Iwan's ongoing testimony in cross-examination; and

(d) admission by Encik Zadey in cross-examination that there was no waiver by PINS to allow Bunga Raya to build but not own small and mini structures in Perak.

[81] To add salt to the wound the plaintiffs were forced to endure being mucked around yet again for the appeal to the Court of Appeal as well as for the leave application to the Federal Court.

[82] As for PW2, her plight was made worse by the mere fact that she was associated with PW1 and/or to the fifth plaintiff. I wholly agreed with her lament that it was 'too much'. I found it absolutely reasonable for her to say that it was a retaliation against her, revenge and to punish her by association.

[83] The above proved that PINS had no true grievances with the plaintiffs. Hence it is my considered view that the collateral purpose for which the tort of abuse of court process is founded on had been satisfactorily proven on a balance of probabilities by the plaintiffs' witnesses.

[84] Having observed PW1 and PW2 while testifying, I found them to be reliable and credible witnesses. I found there was no reason to doubt their testimonies. I accept their evidence. They were convincing and gave evidence forthrightly and were unshaken during cross-examination.

[85] In the circumstances, I am of the considered view that the plaintiffs had succeeded in proving that Encik Zadey and Iwan had through their evidence in Suit No 154 admitted to having had a collateral purpose in filing their suit.

That evidence constituted in my view a clear and present collateral attack by the defendant. It could not have gotten any clearer than those admissions made by the defendant's own witnesses. A

[86] I come now to the decision of Mohd Nazlan Ghazali J in *Yong Toi Mee & Anor v Malpac Holdings Bhd & Ors* [2017] MLJU 1674 referred to by counsel for the defendant. I find no reason to disagree with counsel for the defendant's contention that in that case there were overt acts carried out which showed the defendants' collateral purpose in filing all the various applications and suit thus leaving the High Court with no other option but to conclude that the tort of abuse of court process had been successfully made out. B C

[87] I would however with utmost respect disagree with defence counsel's contention that unlike the findings of the court in *Yong Toi Mee*, the findings of the learned judge in Suit No 154 cannot in itself prove the elements of the tort of abuse of court process. On the contrary I am satisfied that the plaintiffs' pleaded case, the evidence led based on the pleaded case, the testimonies of the witnesses and on the GOJ have shown that this too is an exceptional case on its own merits, where the findings of the learned judge showed that the defendant never had the intention to obtain genuine redress as per the pleadings. D E

[88] Having reviewed the history of the litigation and the evidence led by the plaintiffs, I respectfully agree that the purpose underlying the pursuit of Suit No 154 as found in the findings of the learned judge was for a collateral purpose, intended to produce a result other than those reliefs. That conduct is discernable from the evidence of the two key witness ie Encik Zadey and Iwan. Therefore, while I agree that the facts of the case presently before me are not similar or in tandem with that found in *Yong Toi Mee*'s case, nevertheless on its peculiar facts and circumstances possesses all the trappings of the tort of abuse of process. F G

[89] The defendant could have rebutted all of the plaintiffs' assertions but they have taken the path of choosing not to give evidence. In the circumstances I am guided by the outcome of the decision in the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 where Gopal Sri Ram FCJ (as he then was) enunciated the consequences which followed when a defendant studiously refrained from giving evidence at the end of the plaintiff's case. It was held: H

> (1) Two consequences followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. His failure to direct himself in this fashion thereby occasioned a serious miscarriage of justice. Secondly, the court ought to I

A have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. The trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the B appellant's case on those vital points that lay at the axis of the dispute between the parties. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point amounted to a misdirection which occasioned a miscarriage of justice. A reasonable tribunal correctly directing itself on the facts and the relevant law would C have held that: (a) the appellant had indeed contributed RM194,610 towards the purchase price of the building; (b) that there was a mutual understanding between the appellant and the first respondent that they would be beneficial co-owners of the property in question in equal shares; and (c) that the first respondent had acted in breach of that understanding.

D ...

(3) In the instant case, the Court of Appeal should have been far more analytical of the facts and the proceedings at first instance. In particular, it had failed to refer to the consequence of the first respondent having studiously refrained from entering the witness box. Indeed, it was the first respondent's bounden duty to have informed E the trial court of all the material circumstances peculiarly within her knowledge. The Court of Appeal's judgment was equally flawed as that of the trial judge.

[90] Coming back now to the present case, as I had alluded to earlier I found F both the plaintiffs' witnesses to be reliable and credible witnesses and I accept their evidence to be the truth. It is evident that the failure of the defendant to give evidence lent further weight and gave strength to the plaintiffs' case especially on the vital points that lay at the 'axis' of the dispute between the parties. The defendant led no evidence to explain why when it was put to Iwan G that the only reason allegations were made of the plaintiffs is because of their relationship with Bunga Raya. That admission to me was the proverbial last nail in the coffin for the defendant. I find that the failure of the defendant to appear and give evidence to be a matter of immense serious consequences. In my considered opinion the failure of the defendant to call its witnesses gives me H the right to draw an adverse inference against the defendant under s 114(g) of the Evidence Act 1950 which reads as follows:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the I particular case.

The court may presume ...

(g) that evidence which could be and is not produced would if produced would be unfavourable to the person who withholds it ...

[91] I am inclined to hold the view that the defendant's witnesses deliberately refrained from entering the witness box for no reason other than in view of the less than stellar evidence given in Suit No 154.

[92] Reverting now to the issue at hand, I am satisfied and it is my finding that the plaintiffs had on their pleaded case and through their testimonies successfully discharged their burden of proof and had proven their case on a balance of probabilities.

DAMAGES

[93] The plaintiffs have sought general and special damages against the defendant.

[94] In para 21 of the SOC, the plaintiffs have pleaded that they were injured in their reputation and were put to considerable trouble, inconvenience, anxiety and expenses and have suffered loss and damage.

[95] PW1 in his testimony described his suffering which he averred ought to be compensated by an award for damages:

Q46: Damages for what?

A46: Damages for the following:

(a) Injustice;

(b) Harassment;

(c) Inconvenience;

(d) Trouble;

(e) Worry;

(f) Anxiety;

(g) Time consumed;

(h) Effort consumed;

(i) Revenge;

(j) Punishment; and

(k) Dark cloud over my head for five years.

PW2 in her witness statement testified as follows:

Q16: What are you claiming for in this action?

A16: Damages for being a victim of a very blatant lie and a 'TOO MUCH' Suit No

154. Damages for all the suffering I had to endure for these five years. These suffering are well expressed by Hj Ahmad Kamal bin Zakaria (PW1) in his witness statement. I adopt the way he expressed these sufferings.

[96] The witnesses frankly admitted they could not produce any medical report to support their evidence that they had suffered any particular form of medical condition as a consequence of the suit brought against them.

[97] Counsel for the defendant urged the court not to accept the claim for mental suffering and anguish described by PW1 and PW2. It was contended that almost all the items listed in (a) to (k) above were not pleaded and were simply not supported by documentary evidence. It was further contended that the plaintiffs had failed to discharge their burden in proving those losses.

[98] In view of the above, it was the contention of counsel for the defendant that while general damages could usually be awarded in a claim based on tort, the heads of damages relied on by the plaintiffs do not fall within the recognized definition of heads of damages and therefore compensation ought not to be awarded.

[99] The question for consideration now before this court is to determine whether a victim of a tort of abuse of court process can be compensated for the pain and suffering they experienced. It will be recalled that both PW1 and PW2 described themselves as victims of the defendant's filing of Suit No 154 against them.

[100] A like issue came up for consideration before Wong Kian Kheong J in the case of *Sonic Finance Inc & Anor v Halim bin Mohammad & Ors* [2019] MLJU 1887; [2019] 1 LNS 651. In para 25 of his judgment the learned judge held the view that if a victim of a tort of abuse of court process has suffered pecuniary loss which exceeds the amount of costs awarded in the victim's favour against a tortfeasor, there should be no reason why the victim is not able to recover such a loss.

[101] I am in agreement with that view. It is my finding that a party who has succeeded in proving that the tort of abuse of court process had been practiced upon him is not only entitled to be awarded damages but is also entitled to compensatory damages such as legal fees and expenses incurred to defend the suit as well as for exemplary, punitive and aggravated damages upon proof of the same.

[102] In *Sonic Finance*'s case the court considered the following questions:

(a) whether a victim of a tort of abuse of court process is required to prove malice on the part of the party who has committed the tort before the court can award damages;

(b) whether the victim is confined to a remedy for costs of the suit filed by the tortfeasor against the victim which has been dismissed or struck out; and

(c) whether the court should order the tortfeasor to pay the following kinds of damages to the victim due to the commission of the tort of abuse of court process:

(i) compensatory damages in respect of:

(1) legal fees and expenses incurred by the victim to defend the dismissed suit;

(2) anxiety and distress caused to the victim by the dismissed suit; and

(3) the adverse effect of the dismissed suit on the victim's good name and business reputation,

(ii) exemplary or punitive damages; and

(iii) aggravated damages.

[103] The learned judge referred to a plethora of cases and astutely concluded on the following:

(a) malice is not a consideration when awarding damages;

(b) the affected party is not merely confined to a remedy for costs of the suit filed but is entitled to claim for loss or damage suffered by them beyond those amounts; and

(c) claims for anxiety, distress, loss of good name and reputation is recoverable.

[104] Both PW1 and PW2 described their feelings, the loss, the anxiety they experienced all due to the suit which they felt was unjustly filed hanging over their heads akin to the 'sword of Damocles'.

[105] I share the view of the learned judge in *Sonic Finance*. As aptly put by the learned judge, 'this will cause an injustice to victims of a tort of abuse of court process because these victims cannot claim damages for loss or damage suffered by them beyond the amounts of costs awarded by the court in the suits in question'.

[106] It is my considered view that the plaintiffs had successfully proven that

A they suffered the whole gamut of emotional and pecuniary losses as described by them in their testimonies in court. I cannot agree that these are the usual feelings parties will encounter when they are faced with a suit against them as suggested by counsel for the defendant. Here the plaintiffs had proven that Suit No 154 should never have been filed.

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[107] As discussed earlier they were put to considerable trouble, inconvenience, anxiety and expenses. The plaintiffs are not without remedy for those hardship mentioned above. These are certainly recognized heads of loss and damage for which this court ought to make an award. Having listened to C PW1 and PW2, I was taken by their testimonies on this score. These evidence of suffering described by them deserve a measure of award from the court. I respectfully disagree with learned counsel for the defendant that the plaintiffs should not be compensated for those losses. I am of the opinion that the wronged party must have redress if he has successfully shown that there was an D abuse of court process on the part of the other party. If I were to accept the contention of counsel for the defendant, this will cause an injustice to the plaintiffs.

E **[108]** I lean towards holding the view that there is no necessity to produce a medical certificate to prove that anxiety and distress is a medical condition. I accept the position in law found in the *Sonic Finance*'s case where the learned judge there too found it unnecessary to call for the requirement of a medical certificate as proof.

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[109] Counsel for plaintiffs in their submissions suggested a global sum of RM400,000 be awarded for the three parties comprising of the first plaintiff, Bunga Raya and Urban Domain and RM100,000 for PW2. I have taken into consideration that PINS filed Suit No 154 making serious allegations of G misappropriation of confidential information and trade secrets against all the plaintiffs and had demanded for an account of all proceeds in the hands of the parties. In her evidence, PW2 could not contain her dismay at being accused of stealing information. When quired why she used the word 'steal' information she replied that even though PINS used the polite word 'misappropriation' she H knew that as a layman 'misappropriation' means or is akin to 'steal' and that was too much for her.

[110] To put it in a nutshell I found that the plaintiffs had successfully proven the evidential burden of proving the loss suffered on a balance of I probabilities ie I find as follows:

(a) the loss the plaintiffs suffered is not too remote to be recoverable from the defendant; and

(b) the plaintiffs' loss is caused by the tort perpetrated by the defendant.

[111] I am tasked with the unenviable duty to quantify the compensatory damages that should be awarded to each of the plaintiffs. I kept in mind that compensatory damages should not be exponential but instead should as nearly as possible put the wronged party in the same position as the wronged party would have been in if the tort of abuse of court process had not been committed. I kept in view that the plaintiffs should be adequately compensated, not unjustly enriched or overcompensated at the same time.

[112] Based on the evidence adduced and the relevant case law, I find that the plaintiffs have proven through supporting documents the incurred legal fees and expenses in the sum of RM1,295,056 for defending Suit No 154. Accordingly the plaintiffs are entitled to claim the said sum.

[113] I exercise my discretion to award a global sum of RM100,000 each to the first, fifth and sixth plaintiffs and RM60,000 to the third plaintiff. In my evaluation I did find the contentions of counsel for the plaintiffs on quantum to be of merits. I am of the view that an award of RM100,000 each to the first, fifth and sixth plaintiffs and RM60,000 to the third plaintiff is a sum that is appropriate, fair and reasonable and which would adequately compensate all the plaintiffs without causing the defendant to be adversely affected or economically brought to its knees but yet drive home the point that a party must realize that there is a price to pay when suits are filed not for a genuine redress but for some other dominant insidious collateral purpose.

CONCLUSION

[114] In view of the foregoing reasons, I find that the plaintiffs have succeeded in proving their case against the defendant on a balance of probabilities.

[115] I therefore allowed the reliefs prayed for by the plaintiffs in the terms stated earlier together with interest. I also ordered costs for the plaintiffs.

Order accordingly.

Reported by Ashok Kumar